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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ARNULFO ZEPEDA

on

Habeas Corpus.

D053475

(Imperial County
(Super. Ct. No. EHC00917)

APPEAL from an order of the Superior Court of Imperial County, Jeffrey B. Jones, Judge. Reversed.

Following prison disciplinary proceedings, the senior hearing officer (SHO) found that inmate Arnulfo Zepeda had participated in a riot in violation of California Code of Regulations, title 15, section 3005, and ruled that he forfeit 90 days of conduct credit. Zepeda petitioned the trial court for a writ of habeas corpus, arguing that the ruling violated his constitutional rights because the record did not support the SHO's findings. The trial court granted Zepeda's petition and the warden appeals. Citing the due process standard set forth in *Superintendent v. Hill* (1985) 472 U.S. 445, 455 (*Hill*), the warden

argues that the record contains "some evidence" to support the disciplinary ruling. We agree and reverse the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

Zepeda is serving a sentence of 42 years to life for two murders. At the time of the incident, he was incarcerated at Pleasant Valley State Prison in Coalinga, California. The disciplinary proceedings against Zepeda resulted from a November 3, 2006, riot on the prison's recreation yard. There were approximately 300 inmates in the yard when the riot occurred.

According to prison staff, two fights broke out in the early afternoon between two Fresno Bulldogs and three Southern Hispanic inmates. Zepeda was not named as one of the combatants. The fight between inmates Carrillo and Aguirre moved from the front of Facility C Building 2 (CFB2) toward the soccer goal on the recreation yard. The fight involving inmates Luscano, Chavez and Royzman took place near the corner of CFB2. Correctional Officer Patricia Martinez used the public address system to order the yard down. All inmates complied except Carrillo and Aguirre. Sergeant M.D. Steele instructed staff to form a skirmish line, then ordered Carrillo and Aguirre to "prone out." Both complied. Officers escorted the five named combatants, as well as inmates Leon and Zepeda, to holding tanks for medical evaluations and interviews. Officer J. Worth prepared a schematic map of the incident. The map showed Leon and Zepeda standing in front of CFB2, but did indicate specifically how far they were from Luscano, Chavez and Royzman.

At the hearing before the SHO, Correctional Officer R. DeShazo testified that Zepeda was not an active participant in the riot. DeShazo said that he had relayed his observation that Zepeda was not involved to Worth, who prepared the schematic. Officer Worth did not recall DeShazo's comment. Lieutenant R. Henderson stated that "[i]t [had] been determined that the Southern Hispanic inmates attacked the Fresno Bulldogs, which resulted in this riot. Both Zepeda and Leon [were] known Southern Hispanic inmates, of which it is believed they also were participants in the fighting due to there [sic] placement on the schematic map."

After determining that a riot took place, the SHO defined "participation" for purposes of the disciplinary proceedings: "Participation means the inmate knows he is part of the group of two or more intent upon riot, rout, or unlawful assembly. Usually this means he failed to leave when the opportunity or when violence began." The SHO continued: "Participation in a riot does not necessarily mean that an individual identified on the schematic, in a location had to receive an injury [or] produce injury to another, it simply means acting with or supporting another or others with the intent to commit the aforementioned offense. SHO notes [if] an individual has allegiances and/or links to [a] specific group, which is engaged in a riot and the individual fails to disperse from or get-down at a riot location after instructed to do so and has been identified on the schematic in the riot location, it is presumed the individual participated in the riot with or without staff observing the individual act of participation." Using this definition of participation, the SHO expressly found that Zepeda was identified as a member of the Southern Hispanics, "was identified as being involved in the riot and placed on the

schematic map as #7," and failed to disperse. The SHO acknowledged that the fact Zepeda was "not observed by staff actively participating in the riot" was a mitigating circumstance, but concluded it did not outweigh the preponderance of other evidence received at the hearing. The SHO found Zepeda guilty of participating in a riot.

Zepeda unsuccessfully pursued administrative appeals. He then petitioned for a writ of habeas corpus in Imperial County Superior Court. The court granted the petition and ordered that lost credits be restored. It found there was "no evidence presented at the hearing that [Zepeda] actively participated in the riot." The court continued, "It may be that the hearing officer took notice, based on past experience, that prison gang culture would require an affiliated inmate to participate in any assault committed by one of his fellows in his presence. If so, the hearing officer's taking of 'judicial notice' of this fact is not reflected in the administrative record."

DISCUSSION

The warden argues that Zepeda's admitted gang affiliation and his proximity to the scene of the riot provide some evidence that he participated in the riot in violation of California Code of Regulations, title 15, section 3005.

The Legislature grants the Department of Corrections and Rehabilitation broad authority to promulgate regulations governing the discipline of inmates in state prisons. (*In re Dikes* (2004) 121 Cal.App.4th 825, 829 (*Dikes*).) California Code of Regulations, title 15, section 3005 addresses the conduct of inmates and reads in relevant part:

"(a) Inmates . . . shall obey all laws, regulations, and local procedures, and refrain from behavior which might lead to violence or disorder, or otherwise endangers facility, outside community or another person. [¶] . . . [¶]

"(d) Force or Violence.

"(1) Inmates shall not willfully commit or assist another person in the commission of an assault or battery to any person or persons, nor attempt or threaten the use of force or violence upon another person.

"(2) Inmates shall not, with the intent to cause a riot, willfully engage in conduct that urges a riot, or urges others to commit acts of force or violence at a time and place under circumstances that produce a clear and present and immediate danger of acts of force or violence or the burning or destroying of property.

"(3) Inmates shall not participate in a riot, rout, or unlawful assembly."

Sanctions for prison misconduct include forfeiture of good time credits. (Pen. Code, § 2932, subd. (a).) Inmates are entitled to the benefit of due process protections before being stripped of good time credits in disciplinary proceedings. (*Wolff v. McDonnell* (1974) 418 U.S. 539, 556-557 (*Wolff*); *Dikes, supra*, 121 Cal.App.4th at p. 829.) These protections include written notice of the claimed violation, an opportunity to be heard and call witnesses consistent with prison security interests and a written statement outlining the evidence and reasoning that support the disciplinary action. (*Wolff, supra*, 418 U.S. at pp. 563-567; *Dikes, supra*, 121 Cal.App.4th at p. 830.) Due process also requires that there be "some evidence" to support the disciplinary board's decision to revoke good time credits. (*Hill, supra*, 472 U.S. at p. 454.)

"Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, *the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.*" (*Hill, supra*, 472 U.S. at pp. 455-456, italics added.) In *Hill*, the United States Supreme Court declined to adopt a more stringent constitutional standard, observing that "[p]rison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances. [Citation.] The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact. Revocation of good time credits is not comparable to a criminal conviction, [citation], and neither the amount of evidence necessary to support such a conviction, see *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), nor any other standard greater than some evidence applies in this context." (*Id.* at p. 456; see also *In re Zepeda* (2006) 141 Cal.App.4th 1493, 1499 (*Zepeda*).)

Applying the "some evidence" standard, the courts have upheld disciplinary action against inmates on weak circumstantial evidence. In *Hill*, the court determined there was "some evidence" that inmates Hill and Crawford were guilty of assault where the prison guard found another inmate bleeding around the mouth, observed evidence of a scuffle and saw three inmates, including Hill, jogging away from the scene. (*Hill, supra*, 472 U.S. at p. 447.) The court acknowledged that "[a]lthough the evidence in [the] case might be characterized as meager, and there was no direct evidence identifying any one

of the three inmates as the assailant, the record [was] not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary." (*Id.* at p. 457.) Similarly, in *Zepeda*, this court found "some evidence" that Zepeda possessed a weapon where officers found three razor blades during a routine search of the cell he shared with inmate Valadez. The razor blades were concealed in a cup on a shelf accessible to both men. Valadez stated they were his. (*Zepeda, supra*, 141 Cal.App.4th at p. 1495.) Citing *Hill*, this court concluded that "although the evidence adduced at Zepeda's disciplinary hearing was 'meager' and 'there was no direct evidence identifying' Zepeda as the inmate who committed the infraction [citation], the evidence was sufficient to satisfy the dictates of federal due process." (*Zepeda*, at p. 1499.)

On de novo review of the trial court's order granting Zepeda's petition for writ of habeas corpus, we apply the standard set forth in *Hill* and will uphold the disciplinary action if it is supported by some evidence. (*Zepeda, supra*, 141 Cal.App.4th at p. 1497; *Dikes, supra*, 121 Cal.App.4th at p. 829.)

The SHO based the finding that Zepeda participated in the riot on the fact he was identified as a member of one of the rioting groups, the schematic placed him in the location of the riot, he was identified as being involved in the riot and he failed to disperse. We agree with Zepeda that there is no evidence he was ordered to disperse and failed to do so. The reports indicate that Martinez ordered the inmates "down," and Zepeda complied. No one told inmates to disperse. We also note that Officer DeShazo's statement in the hearing that Zepeda was not an active participant in the riot contradicts Lieutenant Henderson's stated belief that Zepeda's proximity to the fighting and

affiliation with the Southern Hispanics showed he participated in the riot. However, *Hill* makes clear that our de novo review does not involve a review of the entire record, assessment of witness credibility or a weighing of the evidence. (*Hill, supra*, 472 U.S. at pp. 455-456.) We need only determine whether there is *any* evidence in the record to support the SHO's findings. (*Ibid.*) Here, Zepeda's gang affiliation and proximity to the fighting provides some evidence, though meager, that he participated in the riot. Consequently, the trial court erred in granting Zepeda's petition for writ of habeas corpus.

DISPOSITION

The order is reversed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.